

## **REMARKS/ARGUMENTS**

In the Office Action dated August 13, 2009, claims 1 and 19 have been objected to, claims 1 and 25 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Claims 1-10, 12-26, and 29-30 have been rejected under 35 U.S.C. § 103(a).

Claims 1, 12-15, 17-19, and 26 have been amended.

Applicants respectfully traverse these rejections.

### **I. Objections to Claim 1 and 19**

Claim 1 has been objected to. The Examiner asserts it is unclear whether the term “the processor” recited in claim 1 refers to the previously recited “data processing device.” This claim has been amended to clarify the meaning of this term by replacing “the processor” with the term “the data processing device.”

Claim 19 has been objected to because the term “marshall” is in apparent misspelling of the term “marshal.” Claim 19 has been amended to address this objection.

In view of the foregoing, Applicants thus respectfully request withdrawal of these objections.

### **II. Rejections of claims 1 and 25 under 35 U.S.C. § 112**

Claims 1 and 25 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Applicants respectfully traverse this rejection.

Reasoning for the rejection of claim 1 under 35 U.S.C. §112 was not set forth in the Office Action. Accordingly, Applicants believe that this rejection was raised in error (perhaps, as a vestige of the prior Office Action) and have not attempted to address this rejection.

Claim 25 has been rejected as being unclear as to what is intended by the phrase “a group of lowest unique bids.” Applicant respectfully submits that this term is clarified by the background of the specification which explains, for example: “When the auction has closed, at step 514, the administration application carries out a database query to identify a group of lowest unique bids, *e.g.* five.” (Present Application, page 29, lines 28-29.) It is then determined whether the acceptance message for “the lowest of the group of lowest unique bids” was received by the user. (Present Application, page 29, line 30-page 30, line 2.) If it was not

received, “the user details for the next lowest of the group of lowest unique bids are obtained.” (Present Application, page 30, lines 5-9.) “This process continues until the lowest unique bid for which the bid acceptance message status equals received is identified.” (Present Application, page 30, lines 9-10.)

Thus, Applicant respectfully submits that claim 25 is clear to one of skill in the art in view of the background provided above and respectfully request withdrawal of this rejection.

### **III. Rejection of claims 1-10 and 29 under 35 U.S.C. §103(a)**

Claims 1-10 and 29 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over United States Patent Publication No. 2004/0059663 A1 to Herzog et al. (hereinafter “Herzog”) in view of United States Patent Publication No. 2004/0058694 to Mendiola (hereinafter “Mendiola”). Applicants respectfully traverse the rejection.

The factual inquiries that are relevant in the determination of obviousness are determining the scope and contents of the prior art, ascertaining the differences between the prior art and the claims at issue, resolving the level of ordinary skill in the art, and evaluating evidence of secondary consideration. KSR Int’l Co. v. Teleflex Inc., 550 U.S. 398, 2007 U.S. LEXIS 4745, at \*\*4-5 (2007) (citing Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17-18 (1966)). As the Board of Patent Appeals and Interferences has recently confirmed, “obviousness requires a suggestion of all limitations in a claim.” In re Wada and Murphy, Appeal 2007-3733 (citing CFMT, Inc. v. Yieldup Intern. Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003)). Moreover, the analysis in support of an obviousness rejection “should be made explicit.” KSR, 2007 U.S. LEXIS 4745, at \*\*37. “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” Id. (citing In re Kahn, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Furthermore, teaching away from an applicant’s invention demonstrates a lack of *prima facie* obviousness. McGinley v. Franklin Sports, 60 USPQ2d 1001, 1008 (Fed. Cir. 2001); *In re Fine*, 837 F.2d, 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). A reference teaches away from a claimed invention when the reference leads its reader “in a direction divergent from the path that

was taken by the applicant.” Tec Air, Inc. v. Denso Mfg. Mich. Inc., 52 USPQ2d 1294, 1298 (Fed. Cir. 1999).

Claim 1 has been amended to recite:

determine whether each of the plurality of messages comprises an acceptable bid;

for each acceptable bid, send a bid acceptance message by SMS to each of said bidders notifying the bidder of the status of the bidder’s bid;

charge each bidder for sending the bid acceptance message; and

determine a bidder associated with a lowest unique bid for the lot, wherein, at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot, wherein at least one acceptable bid is not a winning bid.

(Claim 1, amendments shown.) Support for these amendments is provided, for example, at page 14, line 4-page 16, lines 6 and Figures 2-3 of the pending application.

As indicated previously, Herzog discloses a method comprising: “offering a product or service to one or more prospective buyers at a maximum price which is below a market price; receiving offers to buy the product from the one or more prospective buyers; and accepting the offer with is correlated to the maximum price.” (Herzog, claim 1; emphasis added.) Also, in Herzog, “the highest unique offer which is the same or below the maximum price” is accepted. (Herzog, claim 2.)

Herzog does not disclose or suggest instructions that are executable to “determine a bidder associated with a lowest unique bid for the lot, wherein, at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot,” (emphasis added) as required by claim 1. Indeed, Herzog teaches away from encouraging low bids at paragraph [0008]. In this paragraph, in the context of a conventional reverse auction, Herzog states that “[i]f a large number of prospective buyers continue to state prices which are unrealistically low, the Reverse Auction organizer and the vendors are likely to spend a considerable amount of time engaging in futile activities.” (Herzog, paragraph [0008].) By determining the winner with the highest unique bid at or below a maximum price, Herzog seeks to avoid the “logistic burden” placed on an auction system by a large number of low bids. (Herzog, paragraph [0008].) Thus, Herzog does not teach or suggest “determin[ing] a bidder associated with a lowest unique bid

for the lot” or “wherein, at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot,” as required by claim 1.

As noted above, in one embodiment of Herzog, the winner is determined by selection of an offer that is correlated to a “maximum price” of the service or product being auctioned. (*e.g.*, Herzog, Abstract and claim 8.) This in no way discloses or suggests “determin[ing] . . . a lowest unique bid” or that “at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot” (as required by claim 1), particularly since the lowest unique bid has no correlation to the “maximum price.” Accordingly, this embodiment of Herzog also teaches away from the claimed subject matter.

Applicants further submit that Herzog teaches away from “determin[ing] . . . a lowest unique bid” or that “at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot” because Herzog teaches acceptance of “the highest unique offer which is the same or below the maximum price.” (*See, e.g.*, Herzog, claim 2; emphasis added). Thus, Applicants respectfully submit that a skilled artisan would not look to or rely on Herzog when attempting to implement the claimed subject matter. Indeed, embodiments of Herzog appear to teach variations upon a “reserve price” (in which the highest bid is accepted only if it is above “the lowest acceptable price,” described at page 1, lines 6-13 of the specification of the present application) or a Dutch auction (“in which several like lots are sold at once to the highest bidder,” as described at page 1, lines 15-16 of the specification of the present application). As such, Applicants submit that it is not appropriate to combine Herzog with any form of a lowest-bidder-wins system to achieve the claimed subject matter.

The Examiner has also bases the rejection upon the reverse auction method described page 1, lines 17-20 of the specification of the present application. (Office Action, page. 12.) In such auctions, a potential buyer invites bids from multiple prospective sellers. Typically, the lowest bid from a seller is then accepted. There is no disclosure or suggestion that a reverse auction would involve “at a close of the auction, [that] the lowest unique bid is a winning bid in the auction for [a] purchase of [a] lot,” as recited in claim 1. (Emphasis added.) Accordingly, this embodiment of a reverse auction does not disclose or suggest the features of the claimed subject matter.

The Examiner also references Mendiola in the rejections. Mendiola describes a messaging system for wireless clients that may be used to facilitate the transfer of information such as information concerning a bid in an auction. (Mendiola, paragraph [0064].) Mendiola does not disclose or suggest “determin[ing] a bidder associated with a lowest unique bid for the lot” or that “at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of the lot,” as required by claim 1. As such, a combination of Mendiola and Herzog does not teach or suggest all the features of the claimed subject matter.

In a recent series of interviews, the Examiner referred to a type of “Dutch” auction. Based on those interviews, Applicant believes that it is the Examiner’s understanding that a Dutch auction is an auction in which the bidding starts at a price and is successively decreased. For example, twenty lots of flowers may be offered for sale at \$100 each. If there are no takers at that price, the price per lot could be reduced to \$98. The price could be successively reduced until all of the lots of flowers are sold. Applicants are not aware of a reference disclosing this type of auction, but note that in view of the amendments provided above that the claimed subject matter is distinguishable from this type of auction. In particular, Applicants respectfully submit that the subject matter “wherein at least one acceptable bid is not a winning bid” is not taught or suggested by the type of auction explained by the Examiner. Based on the explanation from the examiner, bids that are accepted would comprise winning bids.

Applicants thus respectfully submit that the subject matter of claim 1 is not taught or suggested by the cited references. In fact, as noted above, Applicants respectfully submit that the cited references teach away from the claimed subject matter, in which “at a close of the auction, the lowest unique bid is a winning bid in the auction for the purchase of [a] lot, wherein at least one acceptable bid is not a winning bid.”

Accordingly, Applicants respectfully request withdrawal of the rejection of claim 1.

Claims 2-10 and 29 depend directly or indirectly from claim 1. Accordingly, Applicants further submit that claims 2-10 and 29 are allowable for at least the reasons identified above.

#### **IV. Rejection of claims 12-13, 15-16, 18-26 and 30 under 35 U.S.C. §103(a)**

Claims 12-13, 15-16, 18-26, and 30 have been rejected under 35 U.S.C. § 103(a) as being unpatentable over Mendiola in view of Herzog and in further view of M2 Presswire “Link77:

Link77 introduces reverse charge SMS billing service for ringtones and logos” (hereinafter “Link77”) published December 18, 2001. Applicants respectfully traverse this rejection.

The standard for nonobviousness has been set forth above.

Claim 26 recites “wherein, at a close of the auction, a lowest unique bid is a winning bid in the auction for the purchase of the lot, wherein at least one acceptable bid is not a winning bid.” As explained above, neither Herzog nor Mendiola teach or suggest this subject matter. Likewise, Link77 relates “to reverse charge SMS billing service for ringtones and logos” and thus does not teach or suggest the identified subject matter. (Link77, page 1.) Thus, Applicants respectfully request the withdrawal of the rejection of claim 26.

Claims 12-13, 15-16, 18-25, and 30 depend directly or directly from claim 26. As a result, Applicants respectfully submit that claims 12-13, 15-16, 18-25, and 30 are allowable at least for the reasons provided above.

**V. Rejection of claim 14 under 35 U.S.C. §103(a)**

Claim 14 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Mendiola in view of Herzog and in further view of Link77 and in further view of European Patent Application No. EP 1 220 126 A1 to Abeshouse et al. (hereinafter “Abeshouse”). Applicants respectfully traverse this rejection.

The standard for nonobviousness has been set forth above.

Claim 14 depends directly from claim 26. Accordingly, Applicants submit that claim 14 is allowable for at least the reasons provided above in connection with claim 26.

**VI. Rejection of claim 17 under 35 U.S.C. §103(a)**

Claim 17 has been rejected under 35 U.S.C. § 103(a) as being unpatentable over Mendiola in view of Herzog and in further view of Link77 and in further view of Hong Kong’s Tender, published June 2000 (hereinafter “Tender”).

Claim 17 depends indirectly from claim 26. Accordingly, Applicants submit that claim 17 is allowable for at least the reasons provided above in connection with claim 26.

**VII. Conclusion**

Applicants respectfully request that a timely Notice of Allowance be issued in this case. If there are any remaining issues preventing allowance of the pending claims that may be clarified by telephone, the Examiner is requested to call the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert S. Rapp". The signature is fluid and cursive, with the first name "Robert" and last name "Rapp" clearly distinguishable.

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